

Library

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
BOULEVARD EXCAVATING, INC.,)
)
Appellant,)
)
v.)
)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
)
Respondent.)

PCHB No. 77-130

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of three \$250 civil penalties for the alleged violation of Sections 9.04, 9.11(a), and 9.15(a) of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney and Chris Smith, at a formal hearing in Seattle, Washington on January 16, 1978. David Akana presided.

Appellant was represented by its attorney, Thomas R. Dreiling; respondent was represented by its attorney, Keith D. McGoffin.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Pollution Control Hearings

1 Board makes these

2 FINDINGS OF FACT

3 I

4 Pursuant to RCW 43.21B.260, respondent has filed with the Board a
5 certified copy of its Regulation I and amendments thereto which are
6 noticed.

7 II

8 Appellant intermittently operates a gravel mining pit located near
9 200th S.E. and S.E. Jones Road in Renton, Washington under a conditional
10 use permit from King County. Access to and from the pit is provided by
11 two "partially paved" private roads which intersect with a blacktopped
12 county road known as Jones Road, which is periodically sealcoated. Under
13 such permit, appellant has the duty to prevent dust emissions from Jones
14 Road.

15 III

16 Complainant's home, at 2005 S.E. Jones Road, is located about 150
17 feet from the intersection of Jones Road and appellant's exit road. On
18 August 18, 1977 at about 11:20 a.m., respondent's inspector visited
19 complainant's residence as a result of her complaint of dust. While the
20 inspector was at the residence, three of appellant's 22-cubic yard
21 capacity trucks appeared on Jones Road, entered the pit via one private
22 road, picked up a load at the pit, exited via the other private road, and
23 departed from the site on Jones Road in front of complainant's property.
24 The only noticeable dust-covered area on Jones Road was the area between
25 appellant's entrance and exit roads. Dust on the exit road and on Jones
26 Road became airborne as the result of the passage of the three trucks.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Some spillage was observed from the trucks as they left the exit road.
2 The airborne dust caused by the trucks drifted onto complainant's property
3 and landed upon their car, interior and exterior of their home, and upon
4 their fences and pasture. For the foregoing incident, appellant was
5 issued four notices of violation from which followed three \$250 civil
6 penalties and this appeal.

7 IV

8 The month of August was mostly sunny and dry. Respondent's inspector
9 saw no watering trucks, or evidence of their recent use, on the day in
10 question. Appellant testified that he would water down a road, such as
11 in the instant case, when many trucks would travel over a dusty surface.
12 However, appellant had some unspecified trouble with one of its two water
13 trucks that morning and failed to sprinkle the area. Later that day,
14 after appellant had been notified of the inspector's observation, a water
15 truck did wet down the dusty areas, however.

16 V

17 Any Conclusion of Law which should be deemed a Finding of
18 Fact is hereby adopted as such.

19 From these Findings, the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 Section 9.04 of Regulation I provides in part:

23 It shall be unlawful for any person to cause or allow the
24 discharge of particulate matter which becomes deposited upon
the real property of others

25 The section contains certain exceptions which were not shown to be
3 applicable hereto. "Particulate matter" is any solid or liquid material

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 except water, that is airborne. Section 1.07(w). By allowing spillage
2 from the trucks onto the ground, and by causing that dust and dust
3 arising from the road's surface to become airborne and to become deposited
4 on complainant's real property on August 18, 1977, appellant violated
5 Section 9.04.

6 The notice of civil penalty, the controlling document here, adequately
7 describes the violation with reasonable particularity, i.e., the causing
8 or allowing of the discharge of dust from trucks. In any event, appellant
9 could have moved for a more definite statement which it did not do. See
10 WAC 371-08-145.

11 II

12 Section 9.11(a) of Regulation I provides in part that:

13 It shall be unlawful for any person to cause or permit
14 the emission of an air contaminant . . . , including an air
15 contaminant whose emission is not otherwise prohibited by this
16 Regulation, if the air contaminant . . . causes detriment to
the health, safety or welfare of any person, or causes damage
to property

17 "Air contaminant" means "dust" or "other particulate matter." Section
18 1.07(b). "Air pollution" is the presence in the atmosphere of an air
19 contaminant which is "injurious to . . . property, or which unreasonably
20 interferes with enjoyment of life and property." Section 1.07(c).

21 The emission of an air contaminant which unreasonably interferes
22 with a person's enjoyment of life and property violates Section 9.11(a).
23 Boulevard Excavating, Inc. v. Puget Sound Air Pollution Control Agency,
24 PChB No. 77-69 (1977). The dust caused by appellant's trucks on August
25 18, 1977 unreasonably interfered with the enjoyment of life and property
26 of the affected homeowner.

1 III

2 Section 9.15(a) of Regulation I provides:

3 It shall be unlawful for any person to cause or permit
4 particulate matter to be handled, transported or stored
5 without taking reasonable precautions to prevent the
6 particulate matter from becoming airborne.

7 Respondent has shown that appellant had control or responsibility for the
8 road area in question and the materials spilled thereon during transpor-
9 tation, and from which dust became airborne. The burden of presenting
10 evidence is then upon appellant to prove that it had taken "reasonable
11 precautions" to prevent dust from becoming airborne. E.g., Weyerhaeuser
12 Co. v. Puget Sound Air Pollution Control Agency, PCHB 1076 (1977);
13 Boulevard Excavating, Inc. v. Puget Sound Air Pollution Control Agency,
14 supra. Appellant gave testimony that there was some trouble with one of
15 its water trucks. This testimony is not sufficient to show that reason-
16 able precautions were in fact taken, however.

16 IV

17 Each \$250 civil penalty assessed pursuant to Section 3.29 of
18 Regulation I for the violation of Sections 9.04, 9.11(a), and 9.15(a)
19 is reasonable in amount under the circumstances and should be affirmed.

20 V

21 Section 3.29 of Regulation I is not void for having inadequate guide-
22 lines. Compare RCW 70.94.431. See Yakima County Clean Air Authority v.
23 Glascom Builders, Inc., 85 Wn.2d 255 (1975).

24 VI

25 Sections 9.04, 9.11(a), and 9.15(a) of Regulation I are not void for
26 vagueness. State v. Primeau, 70 Wn.2d 109 (1966); State v. Reader's

Digest Ass'n., 81 Wn.2d 259 (1972); Sonitrol Northwest v. Seattle,
84 Wn.2d 588 (1974).

VII

Respondent's actions were not shown to be improper. We have
considered appellant's contentions to the contrary and find them to be
without merit. Each civil civil penalty should be affirmed.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law
is hereby adopted as such.

From these Conclusions the Board enters this

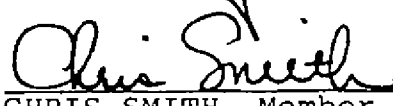
ORDER

Each \$250 civil penalty, Nos. 3457, 3458, and 3459, is affirmed.

DONE this 25th day of January, 1978.

POLLUTION CONTROL HEARINGS BOARD


DAVE J. MOONEY, Member


CHRIS SMITH, Member

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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CROW ROOFING & SHEET METAL, INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB Nos. 77-131, 77-142,
77-144, 77-145, 77-146
and 78-4

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

These matters, the consolidated appeals of eight \$250 civil penalties for the alleged violation of Sections 9.03 and 9.11 of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith at a formal hearing in Seattle on February 2, 3, and 10, 1978. David Akana presided.

Appellant was represented by its attorney, John R. Martin, Jr.; respondent was represented by its attorney, Keith D. McGoffin.

Appellant filed a memorandum; counsel made opening statements.

Having heard the testimony, having examined the exhibits and

1 having considered the contentions of the parties, the Pollution Control
2 Hearings Board makes these

3 FINDINGS OF FACT

4 I

5 Pursuant to RCW 43.21B.260, respondent has filed a certified
6 copy of its Regulation I and amendments thereto which are noticed.

7 II

8 Appellant, Crow Roofing and Sheet Metal, Inc., is located at
9 9500 Aurora Avenue North in Seattle, Washington. It has been in the
10 vicinity of, or at, its present location since 1951. As a part of its
11 business, appellant provides sealing membranes for building roofs at
12 various job sites in the vicinity of Seattle. In the ordinary course
13 of such business, it transports heated asphalt to job sites in asphalt
14 tankers or asphalt kettles.

15 III

16 In 1975 appellant began replacing its asphalt kettles with tankers.
17 The total cost of the equipment changeover was approximately \$70,000.
18 Such changeover was in anticipation of a requirement for use of
19 tankers rather than kettles by the City of Seattle. The use of tankers
20 has allowed appellant to save between 40 and 60 percent of its energy
21 costs. Appellant continues to keep kettles in its inventory for use
22 at places where a tanker is not suitable.

23 IV

24 Appellant maintains an office, shop, and storage shed on its
25 property. The shop portion of the premises is used to park its
26 equipment, trucks, kettles, and tankers. Appellant owns five tankers

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 of various capacities, including one 15-ton, two 6-ton, and two 3-ton
2 tankers. The 15-ton tanker is used to pick up and store hot, liquid
3 asphalt and is parked on the premises near a source of 440 volt
4 electricity. Pursuant to fire department regulations, the tankers are
5 parked not closer than 25 feet to appellant's southern boundary line.
6 Because a 1,000 gallon propane tank is located in the middle of the yard,
7 it is not practical, feasible, or safe to move the tankers elsewhere
8 in the yard.

9 While parked at the premises, an electric heater in each of the
10 6 and 15-ton tankers keeps any asphalt contained therein liquid. The 3-ton
11 tankers are not electrically heated. Ordinarily, the 6-ton tankers and
12 the 3-ton tankers are used at job sites. These tankers are filled with
13 asphalt from the 15-ton tanker. If work is not expected on the following
14 day, or if cancelled for some reason, the 3-ton tankers are emptied into
15 one of the larger tankers which has an electric heater, to avoid cooling
16 and solidifying the asphalt in the small tankers. When transferring
17 products, asphalt is pumped from one tanker to another through a 2-inch
18 hose which is placed through a 12-inch diameter opening of the receiving
19 tanker. Emissions which occur in the instant matters come from this
20 opening during the transfer operation.

V

Appellant's business is located in an area zoned general commercial by the City of Seattle. Immediately adjacent to the southern boundary of appellant's property is the Central Trailer Park, part of which is also

3 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
27 AND ORDER

1 in the general commercial zone and has been located there for many years.

2 VI

3 When the wind is from the north or northwest, some residents
4 in the trailer park have complained to respondent on numerous occasions
5 about the asphalt odor, usually during appellant's transfer operations. In
6 response to each of these complaints, respondent dispatched an inspector to
7 make an investigation. On August 15, 1977 at about 9:00 p.m. in

8
9 1. Section 26.36.010 (amended September 24, 1976) of the Seattle
Zoning Code allows appellant's use subject to conditions:

10 "All uses permitted in this chapter shall be
11 subject to the following conditions:

12 . . .
13 (c) Processes and equipment employed and
14 goods stored, processed or sold shall be
15 limited to those which are not objectionable
by reason of odor, dust, smoke, cinders,
gas, fumes, noise, vibration, refuse matter,
or water-carried waste."
. . . .

16 Section 26.36.085 (amended March 1, 1974) allows dwelling units in
17 a general commercial zone as a conditional use:

18 "The following uses permitted when authorized
19 by the council in accordance with Chapter 26.54:

20 (a) Dwelling units . . . subject to the following
21 additional conditions:

22 (1) When nearby or associated uses and other
23 conditions in the immediate environs are not of
the type to create a nuisance or adversely
affect the desirability of the area for
living purposes.

24 (b) Trailer park"

25 This Board cannot resolve any dispute arising under the Seattle
26 Zoning Code as between the city, appellant and complainants.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

1 response to a complaint of odor, respondent's inspector visited the
2 Hick's and Wittmier's trailers which are located about five feet from
3 appellant's property line. A "strong asphaltic odor" was noticed both
4 outside the trailers and inside the Wittmier's trailer. The source of the
5 odor came from emissions escaping during the transfer of asphalt from
6 appellant's small tanker to its larger tanker. Shortly thereafter, the
7 inspector experienced a headache and watery eyes. He described the odor
8 as annoying and unpleasant and which made him want to leave the area.
9 Two complainants similarly testified as to the strong odor. One
10 complained of burning eyes and a headache; the other complained
11 of nausea before she eventually left her home. For the foregoing
12 occurrence which resulted in complaints from four citizens, appellant was
13 issued four notices of violation for violating Section 9.11(a) of Regulation
14 I from which followed a \$250 civil penalty and the first appeal
15 (PCHB No. 77-131).

16 VII

17 On September 7, 1977 at about 4:30 p.m. in response to a complaint,
18 respondent's inspector visited appellant's property where he saw
19 asphalt being transferred from one tanker to another. He took several
20 photographs of a white-colored visible emission and recorded an opacity
21 of 35 to 100 percent from appellant's tanker for eight minutes
22 within a one hour period. Upon seeing the inspector, a resident from the
23 trailer park requested that he investigate a "terrifically strong" odor
24 which had brought her a headache, burning eyes, and burning nose (which
25 effects would last through the night). The inspector visited the
26 complainant's residence and noticed a "strong obnoxious odor" which caused
27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 a burning sensation in his nasal passages and eyes and which made him want
2 to leave the area. He developed a headache which lasted long after he
3 reached his home. The odor originated from appellant's property. For
4 the foregoing occurrence, appellant was issued two notices of violation,
5 one for violating Section 9.03(b)(2) and another for violating Section
6 9.11(a) of Regulation I, and for which a \$250 civil penalty for each
7 violation was assessed and here appealed (PCHB Nos. 77-144 and 145).

8 VIII

9 On September 12, 1977 at 4:45 p.m., respondent's inspector visited
10 complainant's mobil home court in response to a complaint received
11 earlier that day. At about 5:30 p.m., appellant was seen transferring
12 asphalt from its tankers. Although visual emissions were less than
13 20 percent opacity, an intermittent but very strong odor from appellant's
14 property was noticed at 6:00 p.m. and at 7:00 p.m. The inspector
15 experienced a headache, watery eyes, irritated throat, and wanted
16 to leave the area. Such effects lasted even after reaching his home
17 later that evening. Complainant Hicks developed a headache, burning
18 eyes and nose, and finally left the area after 7:00 p.m. Complainant
19 Wittmier experienced watery eyes, congested chest, hoarse voice, and a
20 headache which lasted ten hours. For the foregoing event, appellant was
21 issued two notices of violation, each for violating Section 9.11(a) at
22 6:00 p.m. and 7:00 p.m., and for which a \$250 civil penalty for each
23 violation was assessed and here appealed (PCHB Nos. 77-142 and 146).

24 IX

25 On October 4, 1977 at about 4:30 p.m., respondent's inspector
26 conducted a surveillance of appellant's operation as a result of

1 a citizen's complaint. At the outset, no activity was observed and
2 only a slight odor was detected. After appellant's operation
3 commenced, the inspector detected a strong asphalt odor from appellant's
4 property which was strong enough to cause him to try to avoid
5 it completely. He experienced watery eyes, throat irritation, and a
6 headache which lasted the remainder of the night. Complainant became
7 nauseated, and experienced burning eyes and a headache before eventually
8 leaving her home. The inspector moved to the northwest corner of the
9 trailer park where he saw a white plume rising from appellant's tanker. He
10 recorded an opacity of 30 to 100 percent for a period of 4-3/4 minutes
11 within a period of twenty-one minutes. For the foregoing events, appellant
12 was assessed two notices of violation, one for violating Section 9.11(a)
13 and the other for violating Section 9.03(b)(2) of Regulation I,
14 and for which a \$250 civil penalty for each violation was assessed
15 and here appealed (PCHB Nos. 77-148 and 150).

16 X

17 On December 23, 1977 at about 8:10 a.m. two of respondent's inspectors
18 visited the trailer park, as a result of a citizen's complaint, and
19 ascertained that an odor was coming from appellant's properties. Although
20 no activity was observed therein, a constant odor which was strong
21 enough to cause one of the inspectors to try to avoid it completely
22 was detected. While interviewing complainant, the inspector developed
23 a headache and eye irritation. Complainant experienced a headache,
24 chest congestion, watery eyes, and mental depression. The inspector
25 did not issue a notice of violation to appellant at that time because
26 he did not feel well. For the violation, a \$250 civil penalty was

27 FINAL FINDINGS OF FACT,
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1 assessed which resulted in this appeal (PCHB No. 78-4).

2 XI

3 Immediately before, during or after each observed violation,
4 respondent's inspector did not notify appellant of his presence or
5 that a notice of violation would be, or was, issued. Appellant was
6 apprised of such violation by certified mail. Appellant was not asked
7 to participate in any odor test, nor was it notified of such prior to the
8 inspector's visits.

9 XII

10 Respondent's inspectors have had no classroom training, which includes
11 laboratory work, on the subject of odors. The evaluation of odors by
12 an inspector is a matter of judgment which has not yet been replaced
13 by a reliable machine. In fact, the only widely accepted means to
14 measure both the quantitative and qualitative aspects of an odor is the
15 human nose.

16 XIII

17 Appellant's employees are not affected by the asphalt: they
18 do not experience watery eyes, headaches, coughs, tight chests, or
19 other adverse reactions. Union representatives for roofers do not
20 themselves feel, nor have they heard complaints of, adverse reactions
21 from asphalt odor.

22 XIV

23 Appellant uses the newest and best available equipment for its
24 business. Notwithstanding this, it is still necessary to observe the
25 level of asphalt in the tank to avoid spillage and possible injury to
26 an employee or damage to the equipment during transfer operations.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Appellant has unsuccessfully attempted to shield the complainants'
2 trailers by placing a large plastic screen between the tanker and the
3 trailers to disperse the odor. Such attempt has cost it \$400.

4 XV

5 Since appellant has switched from kettles to tankers, the owners
6 of the surrounding business activities nearby appellant's premises have
7 not noticed unpleasant asphalt odors even though the prevailing wind
8 carries odors in their direction most of the time. At most, persons
9 from such surrounding businesses have detected odors which were quite
10 minor.

11 XVI

12 Any Conclusion of Law which should be deemed a Finding of Fact
13 is hereby adopted as such.

14 From these Findings come the following

15 CONCLUSIONS OF LAW

16 I

17 Section 9.11(a) of respondent's Regulation I provides that:

18 It shall be unlawful for any person to cause or
19 permit the emission of an air contaminant or water
20 vapor, including an air contaminant whose emission is
21 not otherwise prohibited by this Regulation, if
the air contaminant or water vapor causes detriment
to the health, safety or welfare of any person, or
causes damage to property or business.

22 Section 9.03(b)(2) of respondent's Regulation I provides that:

23 "(I)t shall be unlawful for any person to cause
24 or allow the emission of any air contaminant
25 for a period or periods aggregating more than
three (3) minutes in any one hour, which is:

6 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
27 AND ORDER

1

2 (2) Of such opacity as to obscure an observer's
3 view to a degree equal to or greater than does
4 smoke [which is darker in shade than that
5 designated as No. 1 (20% density) on the
6 Ringelmann Chart]"

7 II

8 Asphalt odor and visible emissions are an "air contaminant"
9 within the meaning of Section 1.07(b) of Regulation I. The presence
10 in or emission into the outdoor atmosphere of such air contaminant
11 "in sufficient quantities and of such characteristics and duration
12 as is, or is likely to be, injurious to human health, plant or animal
13 life, or property, or which unreasonably interferes with enjoyment of
14 life and property" is air pollution. Section 1.07(c and j).

15 III

16 There is no requirement in issuing a notice of violation or in
17 assessing a penalty under Section 3.29 of Regulation I that the violation
18 be "knowingly" caused or permitted. E.g. Kaiser Aluminum, et al. v.
19 PSAPCA, PCHB No. 1017.

20 IV

21 Sections 9.11 and 9.03 are within the authority granted respondent
22 by the Clean Air Act. RCW 70.94.141; 70.94.331; 70.94.380. Moreover,
23 respondent must adopt regulations which are no less stringent than
24 state standards. RCW 70.94.380. In implementing the Act, the state
25 has adopted regulations which appear to be embodied in respondent's
26 regulations. Chapter 18.04 WAC (superseded by chapter 173-400 WAC).

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The evidence presented was that respondent's inspectors and complainants of the trailer park noticed an objectionable odor which caused them to have certain adverse physical effects when the wind came from the north or northwest. The prevailing wind is from a south-southwesterly direction. Other evidence presented was that other persons in establishments surrounding appellant's property did not feel that the odor was objectionable. Union representatives and appellant's employees testified similarly. Whether a violation of Section 9.11 has occurred under such circumstances is necessarily a subjective determination. The Agency must show by a preponderance of the evidence that an air contaminant caused detriment to the health, safety or welfare of any person or caused damage to property or business. The fundamental inquiry is whether the air pollution is of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. Cudahy Co. v. PSAPCA, PCHB No. 77-98 (1977). In weighing the evidence in these matters, there is adequate proof that significant detriment to health and welfare, and/or unreasonable interference with enjoyment of life and property, was caused or allowed to others by appellant at each of the times and dates alleged. As such, appellant was shown to have violated Section 9.11(a) of Regulation I for which six (6) \$250 civil penalties (Nos. 3452, 3494, 3497, 3504, 3524 and 3631) assessed were proper and each should be affirmed.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

1 VI

2 Appellant violated Section 9.03(b)(2) of Regulation I on
3 September 7 and October 4, 1977 by causing or allowing the emission
4 of an air contaminant for a period aggregating more than three minutes
5 in any one hour which was greater than 20 percent opacity on each of such
6 days. The two (2) \$250 civil penalties (Nos. 3493 and 3523) assessed
7 therefor were proper and should be affirmed.

8 VII

9 Respondent's Section 3.05(b) does not require notice to appellant
10 that an investigation of an alleged violation is about to occur.

11 VIII

12 This Board has no jurisdiction to decide substantive constitutional
13 issues and must presume statutes and regulations to be constitutional.
14 See Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257 (1975).

15 IX

16 Appellant's remaining contentions are without merit.

17 X

18 Any Finding of Fact which should be deemed a Conclusion of Law
19 is hereby adopted as such.

20 From these Conclusions, the Pollution Control Hearings Board
21 enters this

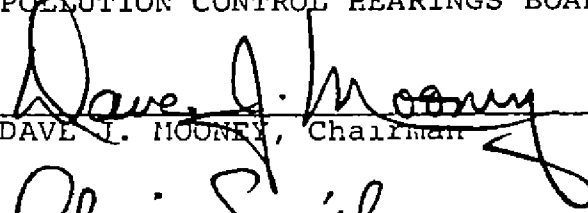
22 ORDER

23 Each \$250 civil penalty (Nos. 3452, 3493, 3494, 3497, 3504,
24 3523, 3524 and 3631) is affirmed.

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

1 DATED this 24th day of February, 1978.

2 POLLUTION CONTROL HEARINGS BOARD

3 
4 DAVE J. MOONEY, Chairman

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6 CHRIS SMITH, Member

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6 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

File
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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
WARREN J. RIDDLE,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 77-133

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This appeal came on for hearing before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney, members, on January 10, 1978, in Spokane, Washington. Hearing examiner William A. Harrison presided. The last post-hearing brief in this matter was received on March 3, 1978.

Appellant appeals from an order of the Department requiring him to release sufficient water from his diversion dam to satisfy "downstream stock water rights" at all times. Respondent elected a formal hearing pursuant to RCW 43.21B.230. The Spokane court reporting firm of

1 Reiter, Storey and Miller recorded the proceedings.

2 Appellant appeared pro se; respondent was represented by
3 Robert E. Mack, Assistant Attorney General. Having heard the testimony,
4 having examined the exhibits, having considered briefs and arguments,
5 and being fully advised, the Hearings Board makes and enters the
6 following

7 FINDINGS OF FACT

8 I

9 This case involves a dispute over the waters of Deadman Creek,
10 a surface water located in Spokane County. There has not been a
11 general adjudication of water rights on Deadman Creek under the
12 Water Code of 1917 (RCW 90.03.110-.240). Neither has the respondent,
13 Department of Ecology, adopted minimum flow regulations for Deadman
14 Creek under chapter 90.22 RCW.

15 II

16 The appellant, Warren J. Riddle, irrigates some 200 acres of
17 alfalfa by withdrawing water from Deadman Creek as it crosses his
18 farm. (The point of diversion is indicated by a red "x" on Exhibit
19 R-1.) Appellant claims a right, by appropriation, to four cubic
20 feet per second from Deadman Creek for this irrigation and other beneficial
21 uses. This claim is based upon the 1911 "Notice of Water Right"
22 (Exhibit R-2) of one John Fuher which, with minor variation, specifies
23 the same point of diversion and place of use as now utilized by
24 appellant. Appellant has filed this claim of water right with
25 the respondent, Department of Ecology, pursuant to chapter 90.14 RCW.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

1 III

2 Acting in response to complaints concerning Deadman Creek,
3 the respondent, Department of Ecology (DOE), issued a regulatory order
4 to appellant, being Docket No. DE 77-424, dated August 26, 1977.
5 That order stated, inter-alia:

6 . . .
7 You are withdrawing/diverting water from
8 Deadman Creek. Regulation is required
9 because your use interferes with riparian
10 stockwater rights as required to be
11 maintained in Chapter 90.22 RCW.
12 . . .

13 IT IS ORDERED that sufficient water to
14 satisfy downstream stock water rights
15 be released from your diversion dam on
16 Deadman Creek at all times.
17

18 From this order, appellant appeals.

19 IV

20 Specifically, the DOE contends that appellant's withdrawals
21 from Deadman Creek interfere with the stockwater rights of two
22 downstream owners, persons named Knapp and Feryn who together own
23 some 124 head of cattle. Such stockwater rights as Knapp and
24 Feryn may hold are not evidenced by any writing.

25 V

26 At the time the appealed order was issued, August, 1977, conditions
27 of unusual drought prevailed throughout the state. Although the flow
in Deadman Creek was not always sufficient for his own irrigation
needs, the appellant, Riddle, discussed the situation with
Mr. Feryn, one of the downstream cattle owners. Riddle promised

1 to bypass such water as he could spare although he, Riddle,
2 contended that he was not legally required to do so. Riddle did
3 allow water to flow by his point of diversion, downstream. At all
4 times when respondent, DOE, found water flowing in Deadman Creek
5 upstream of Riddle, it likewise found water flowing downstream of
6 Riddle (Exhibit R-6). The DOE does not know how much stream flow
7 is required to water the 124 cattle downstream and therefore cannot
8 say that the flows which it observed downstream of Riddle (Exhibit R-6)
9 are insufficient. Mr. Feryn was not present to testify as to the
10 sufficiency of water flow at his property, and the respondent's own
11 field investigation of Mr. Feryn's property disclosed that water was
12 available for Feryn's cattle on August 23, 1977, three days prior to
13 the date of the appealed order.

14 We find, therefore, that at and prior to the date of the appealed
15 order, DOE did not show that Riddle was not releasing sufficient water
16 to satisfy downstream stockwatering requirements.

17 VI

18 Any Conclusion of Law hereinafter stated which is deemed to be
19 a Finding of Fact is adopted herewith as such.

20 From these Findings, the Pollution Control Hearings Board
21 comes to these

22 CONCLUSIONS OF LAW

23 I

24 We have found that DOE did not show that Riddle was not releasing
25 sufficient water to satisfy downstream stockwater requirements when the
26 appealed order was issued. While this fact renders the order inappropriate

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 when issued, we must review it further because the order operates
2 prospectively in commanding appellant to release sufficient water
3 "at all times". This feature of the order poses an ongoing controversy
4 between the parties which is now ripe for decision.

5 II

6 In issuing the appealed order, DOE determined the legal rights
7 and duties of the appellant as contrasted with those of the downstream
8 cattle owners. This difficult determination was made without the
9 guidance of a general adjudication of the water rights in that
10 locality, as set out in the Water Code of 1917 (RCW 90.03.100-.240).
11 Nevertheless, DOE acted properly in attempting to decipher the existing
12 water rights. This is so because of the language of RCW 43.21.130 which
13 states that DOE ". . . shall regulate and control the diversion of water
14 in accordance with the rights thereto . . .". There is no authority
15 for the proposition that water rights do not begin until the
16 adjudication specified in the Water Code of 1917 supra, nor is the
17 statutory mandate to DOE that it shall regulate water only in
18 accordance with adjudicated rights.

19 Next, this Hearings Board has jurisdiction to hear and decide
20 appeals from any person aggrieved by an order of DOE, RCW 43.21B.110.
21 It follows, therefore, that in testing the merits of the appealed
22 order, this Hearings Board must also determine the legal rights and
23 duties of the appellant and downstream cattle owners. This is not
24 a general adjudication as accorded to the superior courts by the
25 Water Code of 1917, supra. Scheibe v. DOE, PCHE No. 36 (1972).
26 Neither is the general adjudication of the Water Code of 1917 the

1 exclusive procedure by which a water right may be brought under
2 judicial scrutiny. State ex rel. Roseburg v. Mohar, 169 Wn. 368,
3 13 P.2d 454 (1932), Pate v. Peterson, 107 Wn. 93, 180 P. 894 (1919)
4 and Waters of Crab Creek, In re, 194 Wn. 634, 79 P.2d 323 (1938).

5 III

6 Appellant, Riddle, holds an appropriative surface water right of
7 four cubic feet per second from the waters of Deadman Creek in
8 accordance with the Notice of Water Right admitted as Exhibit R-2.
9 This Notice of Water Right is sufficient to confer a water right
10 under chapter 142, Laws of 1891 provided that the appropriation was
11 diligently prosecuted to completion. . . . The Notice of Water Right
12 contains a sworn statement, at paragraph 2, that "It is intended to
13 divert said water. . .". From those words, written more than sixty
14 years ago by one who is a stranger to this appeal, we conclude that the
15 appropriation was diligently completed shortly after that statement of
16 intent. State v. Smith, 85 Wn.2d 840, 540 P.2d 424 (1975), Ford v.
17 United Brotherhood of Carpenters, 50 Wn.2d 832, 315 P.2d 299 (1957)
18 and cases and sections from Wigmore on Evidence, (3d Edition) cited
19 therein re: concluding that an act intended to be done was done. There
20 is no evidence that the appropriation was not completed shortly after
21 the statement of intent. The priority of appellant's right relates
22 back to the date of posting which is August 21, 1911.

23 IV

24 The respondent, DOE, contends that downstream landowners have
25 rights, superior to appellant's, to such water as their cattle can
26 drink directly from Deadman Creek. This contention rests on one or

both of the following legal theories, namely 1) that the language of RCW 90.22.040 creates a state policy favoring in-stream stockwatering and that this policy can be implemented by diminishing water rights for other beneficial uses which were in existence when this state policy came into being (1969) or 2) that the downstream owners hold riparian water rights which are superior to appellant's appropriative right. For the reasons which follow, we disagree.

1) RCW 90.22.040 states that:

STOCKWATERING REQUIREMENTS. It shall be the policy of the state, and the department of water resources shall be so guided in the implementation of RCW 90.22.010 and 90.22.020, to retain sufficient minimum flows or levels in streams, lakes or other public waters to provide adequate waters in such water sources to satisfy stockwatering requirements for stock on riparian grazing lands which drink directly therefrom where such retention shall not result in an unconscionable waste of public waters. The policy hereof shall not apply to stockwatering relating to feed lots and other activities which are not related to normal stockgrazing land uses.

In this case there has been no implementation of RCW 90.22.010 and .020 by which minimum flows for streams may be established by regulation after notice and public hearing. Nevertheless, DOE argues that the policy favoring in-stream stockwatering, like a phantom ship floating above the water, exists free of the context in which it is found. Assuming that this interpretation is correct, however, neither the statute itself nor the legislative history give any clue as to how the policy is to be implemented, other than through minimum flow regulations under RCW 90.22.010 and .020. In the absence of legislative guidance on how to implement such a policy, we will not condone the

1 | diminishment of appellant's irrigation water right which was in existence
2 | when this policy came into being with the advent of RCW 90.22.040 in
3 | 1969. It is important to note in this regard that RCW 90.22.030 states,
4 | "The establishment of levels and flows pursuant to RCW 90.22.010 shall
5 | in no way affect existing water and storage rights and the use thereof
6 | . . .".

7 | Even if the language of RCW 90.22.040 does create a stockwatering
8 | policy which can diminish water rights existing when that policy came
9 | into being (1969), we conclude that DOE did not show that that policy
10 | was violated by appellant. DOE did not show that adequate waters were
11 | not available to meet downstream stockwatering requirements nor that
12 | appellant's release of water for stockwatering would not result in an
13 | unconscionable waste.

14 | We therefore conclude that RCW 90.22.040 provides no support for
15 | the DOE regulatory order now on appeal.

16 | 2) Riparian water rights. In this case, DOE has not affirmatively
17 | shown who, downstream of appellant, holds a riparian water right nor
18 | what number of cattle must be watered pursuant to such a right. The
19 | complex and conflicting theories which compete for supremacy in
20 | determining a riparian right make it all the more imperative to
21 | define a riparian right carefully before attempting to protect it
22 | by regulatory order. We conclude that DOE has not shown any
23 | specific downstream riparian right which is superior to appellant's
24 | appropriative right.

25 | V

26 | Any Finding of Fact which should be deemed a Conclusion of
27 | FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Law is hereby adopted as such.

2 From these Conclusions the Pollution Control Hearings Board
3 issues this

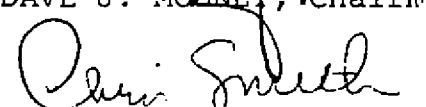
4 ORDER

5 The Department of Ecology Order, Docket No. DE 77-424, is hereby
6 reversed.

7 DONE at Lacey, Washington this 13th day of March, 1978.

8 POLLUTION CONTROL HEARINGS BOARD

9
10 
11 DAVE S. MOONEY, Chairman

12 
CHRIS SMITH, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
AND
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
YAKIMA INDIAN NATION,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON,)
DEPARTMENTS OF GAME, FISHERIES,)
ECOLOGY & NATURAL RESOURCES;)
Klickitat County and)
GIBBONS AND REED COMPANY,)
Respondent.)

PCHB No. 77-134
SHB No. 77-35
ECPA No. 7

ORDER OF REMAND AND DISMISSAL

It appearing that an environmental impact statement (EIS) will be prepared for the subject project, and it further appearing that the permits which are the subject matter of these appeals should be remanded until the completion of the EIS process and appropriate consideration thereon,

IT IS ORDERED that each permit in the above-entitled matters is remanded to the permit issuing authority for reconsideration after

1 completion of the EIS process, and that the appeals are dismissed with-
2 out prejudice.

3 DONE at Lacey, Washington this 15th day of October, 1982.

4
5 POLLUTION CONTROL HEARINGS BOARD

SHORELINES HEARINGS BOARD

6
7 David Akana
8 DAVID AKANA, Lawyer Member

David Akana
DAVID AKANA, Lawyer Member

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10 Gayle Rothrock
GAYLE ROTHROCK, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Chairman

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12 Lawrence J. Faulk
13 LAWRENCE J. FAULK, Member

Lawrence J. Faulk
LAWRENCE J. FAULK, Member

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15 Richard A O'Neal

16
17 James E. Burt